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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 184

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION, PETITIONER

v.

THE SECURITIES AND EXCHANGE COMMISSION, THE UNITED CORPORATION, EDWARD R. DOWNING, RANDOLPH PHILLIPS, AND 22,081 STOCKHOLDERS OF THE UNITED CORPORATION

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The findings, opinions, and order of the Securities and Exchange Commission (the "Commission") (R. 1–82) are not yet officially reported, but are set forth in Holding Company Act Releases Nos. 10,614 and 10,643. The opinion of the Court of Appeals (R. 403–425) is reported in 203 F. 2d 611.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1953 (R. 426–427). A petition for rehearing (R. 428) was denied on April 22, 1953 (R. 446). The petition for a writ of certiorari was granted on October 12, 1953 (R. 465). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79x (a).

QUESTION PRESENTED

Did the Court of Appeals have jurisdiction under Section 24 (a) of the Public Utility Holding Company Act of 1935 to review directly and to affirm that portion of an order of the Securities and Exchange Commission which approved certain provisions of a simplification plan for a registered holding company under Section 11 (e) of the Act where, under the terms of the plan and the Commission's order, those provisions of the plan were not to become operative until further approved and ordered enforced by a district court upon application of the Commission pursuant to Section 11 (e)?

STATUTE INVOLVED

The following are the court review and enforcement provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79, *et seq.*:

Section 11 (e), 15 U. S. C. 79k (e):

In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and pro-

visions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Section 18 (f), 15 U. S. C. 79r (f):

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond.

Section 24 (a), 15 U. S. C. 79x (a):

Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in

the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such addi-

> tional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Other pertinent statutory provisions are set forth in the Appendix, pp. 37–38 *infra*.

STATEMENT

The order granting the writ of certiorari limits the question before this Court to that of the jurisdiction of the Court of Appeals to review and affirm an order of the Commission approving, pursuant to Section 11 (e) of the Act, a simplification plan submitted by The United Corporation ("United"), a registered holding company. The provisions of the plan contested by petitioner

here propose the cancellation of United's option warrants. United expressly requested, pursuant to Section 11 (e), that the Commission apply to a United States district court for enforcement of these provisions, among others (R. 79). The Commission's order expressly conditioned the consummation of these provisions of the plan upon such enforcement by a district court. No enforcement was requested with respect to certain other provisions of the simplification plan, and the Commission's order authorized consummation of those provisions forthwith. That part of the Commission's order was also affirmed by the Court of Appeals, and is the subject of a separate petition pending in No. 154, as to which a separate brief in opposition has been filed.

United, a Delaware corporation organized in 1929, is registered as a holding company under the Act. At one time it controlled, directly or indirectly, many gas and electric utility companies in the Eastern seaboard and adjoining area. (R. 3–4.)[1]

On August 14, 1943, the Commission issued its findings, opinion and order directing action pursuant to the corporate simplification standards of Section 11 (b) (2) of the Act and passing upon a plan of United under Section 11 (e). The

[1] A detailed account of the organization of United and its acquisitions is described in *The United Corporation*, 13 SEC 854, 856–864, 866–871 (1943).

Commission found, *inter alia*, that the corporate existence of United as a holding company and its securities structure, which then included preference and common stocks, violated the standards of Section 11 (b) (2), and that voting power was unfairly and inequitably distributed among its preference and common stockholders (13 S. E. C., at 875–881). The Commission rejected United's 1943 plan because it did not provide for divestment of control; because it offered nothing that would assure the expeditious disposition of any of its holdings; and because it made no provision for a fair and equitable distribution of voting power among its preference and common stockholders. The Commission's findings stated that dissolution would be appropriate, but that the Commission would withhold the issuance of a dissolution order so as to afford United an opportunity to demonstate that it might achieve compliance with the Act by divestment of control over its utility subsidiaries for the purpose of becoming an investment company. (13 S. E. C., at 899.) Accordingly, the Commission's order under Section 11 (b) (2) directed that United cease to be a holding company and limit its corporate structure to a single class of stock, namely, common stock (R. 6, 373–374). No review of that order was sought. Since the entry of that order, United has retired its preference stock by exchange for underlying portfolio securities and cash. Additional portfolio securities were dis-

posed of through market sales and dividend distributions. (R. 6–7.)

As of December 31, 1950, United had outstanding 14,529,491.5 shares of common stock. It also had outstanding option warrants entitling the holders thereof to purchase a total of 3,732,059 shares of common stock at any time at a price of $27.50 per share (R. 5). The option warrant, as the Commission found (R. 48), conferred upon its holder no right or interest in the present assets and earnings of United, but merely a right without limit of time to purchase United's common stock upon tender of the subscription price. The warrant holder had no right to require that earnings of United be retained to improve the value of the common stock subject to the option, and United was permitted to capitalize its earnings by issuing additional shares of common stock as stock dividends, with no adjustment in the option price.[8] Except for differences in the exercise price, the terms of the option warrants were substantially the same as those involved in the *Niagara Hudson* and *Commonwealth & Southern* cases.[9]

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[8] Provision was made for adjustment of the option price in the event of a stock split, as distinguished from a stock dividend.

[9] *Niagara Hudson Power Corporation v. Leventritt*, 340 U. S. 336; *In re Commonwealth & Southern Corp.*, 184 F. 2d 81 (C. A. 3), certiorari denied, 340 U. S. 929.

United's assets, at market values as of December 31, 1950, consisted approximately of $57,600,000 of securities and of about $2,000,000 in cash and government bonds, equivalent to $4.12 per share of common stock (R. 5). The securities consisted of common stocks of utility operating and holding companies, including 11.9% of the total voting stock of Niagara Mohawk Power Corporation ("Niagara Mohawk"), 28.3% of the common stock of South Jersey Gas Company ("South Jersey"), 5.8% of the capital stock of The United Gas Improvement Company ("UGI"), 5.5% of the common stock of The Columbia Gas System, Inc. ("Columbia"), and common stocks of other companies in amounts less than 5% of the total outstanding (R. 5).

As its final act of compliance with Section 11 (b) (2) of the Act (Appendix, *infra*, pp. 37–38) and with the Commission's 1943 order, United submitted a plan providing for the sale by United of all of its South Jersey common stock and the sale of sufficient amounts of its stockholdings in Niagara Mohawk, Columbia Gas, and UGI so that its resultant holdings would not exceed 4.9 percent of the voting stocks of any of these companies. The plan also contemplated that United's registration as a holding company would be terminated upon application of United under Section 5 (d) of the Act (Appendix, *infra*, p. 37), to be made after such divestments. Thereafter,

United would continue to do business as an investment company registered under the Investment Company Act of 1940, 15 U. S. C. 80a *et seq.* (R. 7.) These provisions of the plan, and certain others not here material, would become effective upon Commission approval and were not conditioned upon further approval and enforcement by a district court (R. 79).

The plan further provided for the elimination of United's option warrants and for modification of United's certificate of incorporation and by-laws in regard to cumulative voting and enlarged quorum requirements for stockholders' meetings (R. 9). With respect to these provisions of the plan, United requested the Commission to apply for court enforcement pursuant to Section 11 (e) of the Act (R. 79). As previously indicated, that section permits the Commission to apply for court enforcement at the request of the company, and authorizes such enforcement only if the district court, "after notice and opportunity for hearing" approves the plan as "fair and equitable and as appropriate to effectuate the provisions of section 11."

After extensive hearings, the Commission approved United's plan, as amended in accordance with the Commission's findings (R. 77–82). The Commission found that the divestments proposed by the plan would further advance United's compliance with Section 11 (b) (2) and the Commis-

sion's 1943 order thereunder (R. 10–13). The Commission deferred the question whether further divestments may be necessary to make United cease to be a holding company under the Act until such divestments are completed and an application under Section 5 (d) (Appendix, *infra*, p. 37) to terminate its registration as a holding company under the Act is presented by United (R. 12–13).

As to the option warrants, the Commission concluded (1) that to permit them to remain outstanding "would be inherently deceptive to investors and perpetuate in the corporate structure useless and unnecessary complexities, in contravention of the requirements of Section 11 (b) (2)" (R. 55), and (2) that it was unable to find "that there is a reasonable expectation that United's earnings and assets over the foreseeable future will be such that the market price of its common stock will increase to the extent needed to give the warrants a recognizable value" (R. 54). In accordance with its consistent interpretation of the "fair and equitable" standard, the Commission concluded that the warrants represent no measurable investment value in the enterprise. Accordingly, the holders of the warrants could not receive any compensation at the expense of the common stockholders for the elimination of

the warrants. See *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336.[4]

With respect to these provisions of the plan as to which district court enforcement was requested by United, the Commission's order expressly provided (R. 80):

> The order entered herein shall not be operative to authorize the consummation of the provisions of the plan as amended relating to the cancellation of United's option warrants or to the amendment of United's Certificate of Incorporation or By-Laws until an appropriate United States District Court shall, upon application thereto, enter an order enforcing said provisions.

In view of the prospect that review by a court of appeals might be sought as to other phases of the plan whose effectiveness was not conditioned

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[4] The Commission found that the exercise price of $27.50 per share represents "approximately 130 times the net income applicable to United's present portfolio which we have previously found could be appropriately used in testing the fairness of the plan" and that it is approximately 90 times such earnings if the option price were adjusted to reflect certain capital distributions by United (R. 50). The Commission found that in terms of asset values United's present assets of about 60 million dollars would have to appreciate approximately 565% in order to give a value to the warrants at the exercise price, or 365% if adjusted to reflect the capital distributions by United (R. 53). In terms of market price, the Commission noted that the common stock of United was recently selling at a high of 4¾, so that an increase of about 5.8 times would have to be attained in order to reach the exercise price (R. 54).

upon district court enforcement, the Commission stated that it would "defer applying for court enforcement for the time being" as respects the provisions whose effectiveness was so conditioned (R. 80).[1]

Thereafter, a petition for review pursuant to Section 24 (a) of the Act was filed in the court below by certain common stockholders who are now petitioners in No. 164. These stockholders sought review only as to those phases of the plan which were objectionable to them and which were to be operative without district court enforcement. They requested, however, that the court of appeals also assume jurisdiction to enforce the other provisions of the plan which they favored but which, under the terms of the plan and the Commission's order, were not to be operative until approved and ordered enforced by a district court,

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[1] One of the important provisions of the plan was the offer of the portfolio securities to such stockholders of United as might desire to withdraw from the company prior to its transformation into an investment company (R. 36-47). The terms of this offer were geared to stock market quotations, and prompt consummation was deemed desirable by United in order to take advantage of the relatively favorable market relationship between United's stock prices and the Niagara Mohawk stock prices existing when the offer was proposed. This factor, as well as United's apparent ability to consummate such provisions of the plan without requiring a stockholder vote or court enforcement, would explain why United chose not to request district court enforcement thereof. Under Section 11 (e), as shown above, the Commission may apply for such enforcement only if requested to do so by the company.

including the elimination of the warrants (R. 406–7).

On October 26, 1951, or approximately four months after the entry of the Commission's order, while the stockholders' motion for enforcement in the Court of Appeals was pending and after the Commission had challenged the court's jurisdiction with respect to the provisions of the plan affecting the warrants, petitioner filed in the Court of Appeals a motion for leave to intervene (R. 242–245). Petitioner's moving papers attacked the merits of the plan insofar as it affected the warrants. In explanation of its reasons for seeking intervention, petitioner stated that it "could not have itself filed a petition to review the Commission's order of June 26, 1951," since the provisions to which it objected were not effective until ordered enforced by a district court (R. 243). In view of the stockholders' petition, however, and the provision of Section 24 (a) with respect to the Court of Appeals' "exclusive jurisdiction to affirm, modify, or set aside such order," petitioner stated that it had an interest because the order of the Commission "if affirmed, and the plan, if enforced, would make the warrants worthless" (R. 244). On the other hand, the Commission urged that the Court of Appeals had no jurisdiction at all with respect to those provisions of the plan whose effectiveness was conditioned upon approval and enforcement by a district court, and

that affirmance of the Commission's order in respect to the matters properly before it under Section 24 (a) would not encompass *ex proprio vigore* the order in its entirety (R. 247–252). An answer objecting to petitioner's motion on jurisdictional grounds was also filed by United (R. 254–256). In its reply (R. 257–260), petitioner did not endorse the Commission's views on the exclusive jurisdiction of the district court under Section 11 (e). Rather it reiterated its views that the "exclusive jurisdiction" under Section 24 (a) might extend to other aspects of the plan, regardless of the particular circumstances that occasioned the review proceedings initially. Petitioner further stated (R. 258–259): "The assumption of jurisdiction by this Court *of the entire order* of the Commission will expedite an early final determination of the case since this Court, by its orders of November 5, 1951, has evidenced its intention of expediting the matter, and *since this Court has jurisdiction under Section 24 (a) of the Act to settle the matter finally without sending it back to the Commission for further proceedings.*" [Emphasis supplied.]

The court below deferred its decision on petitioner's motion for leave to intervene until submission of the case on the merits and granted petitioner leave to file a brief and to present oral argument (R. 267). Petitioner filed a brief addressed to the merits of the plan's

treatment of the option warrants and an appendix to its brief (R. 36–276), setting forth the portions of the record it deemed pertinent to a consideration of its case. Petitioner also presented oral argument which, by order of the court, was limited to the merits (R. 399).

After consideration of the entire case on the merits, the court below granted petitioner's motion to intervene (R. 407, 426). It held that under Section 24 (a) of the Act it had jurisdiction to review the order of the Commission in its entirety, including that part which pertained to the warrants, since no enforcement proceedings were pending in the district court when the review proceedings were initiated in the court below (R. 419). It held, however, that upon affirmance it could not enforce these phases of the plan, and to that end further proceedings must be had in the district court, in which the order of affirmance would be *res judicata* (R. 417). On the merits, the court affirmed the Commission's findings that the provision for eliminating the option warrants is required by the standards of Section 11 (b) (2) and is fair and equitable (R. 425), stating that the findings of the Commission that the warrants had no measurable value "are supported by evidence which we regard as substantial" (R. 424).

While the review proceedings were pending in the court below, petitioner filed motions seeking leave to adduce additional evidence (R. 376, 448).

These motions sought to show that since the Commission's approval of the plan United had disposed of its entire investment in South Jersey and that United's holdings in Niagara Mohawk had been reduced to less than 10% (R. 381, 449). As previously noted, the plan itself expressly contemplated the sale of United's stock interest in South Jersey and a reduction in its investment in Niagara Mohawk to less than 5%. The court below denied these motions (R. 407, 426).

A petition for rehearing was filed by the petitioner on April 13, 1953, based solely upon petitioner's motions for leave to adduce additional evidence (R. 428–445). No issue was raised in that petition as to the jurisdiction of the court below regarding the part of the plan affecting the warrants. The petition was denied by the court below on April 22, 1953 (R. 446).

As previously indicated, this Court granted a writ of certiorari "limited to the question as to the jurisdiction of a court of appeals or a district court to review orders of the Securities and Exchange Commission" (R. 465).

SUMMARY OF ARGUMENT

I

The Court of Appeals had jurisdiction under Section 24 (a) of the Act to review directly and to affirm the Commission's order to the extent that the order approved provisions of the simpli-

fication plan with respect to which no district court enforcement was requested or contemplated. Judicial review of this portion of the Commission's order could not be obtained in a district court under Section 11 (e), but only in a court of appeals under Section 24 (a) upon a timely petition filed by an "aggrieved" person.

II

The Court of Appeals did not have jurisdiction to review directly the Commission's order insofar as the order approved other provisions of the simplification plan upon condition that these provisions were not to become effective until also approved and ordered enforced by a district court, pursuant to an application made by the Commission at the request of the affected company, in accordance with Section 11 (e).

The district court review and enforcement provisions of Section 11 (e) are not merely duplicative of the direct court of appeals review provisions of Section 24 (a) so as to make the availability of particular provisions dependent upon the outcome of a race for the courts, as the court below held. The purpose of the Section 11 (e) enforcement provisions is to aid consummation of proposals which, while approved by the Commission, might present practical difficulties of consummation absent exercise of the broad powers vested in an appropriate district court by

Section 11 (e). The provisions of Section 24 (a), on the other hand, were intended to afford direct appellate court review of Commission orders which partake of finality, including unconditional orders approving simplification plan provisions where district court enforcement under Section 11 (e) is not contemplated. Contrary to the suggestion of the court below, in view of the purpose of Section 11 (e), the Commission may properly condition its approval order upon district court enforcement whenever such enforcement is requested by the affected company and is deemed necessary or desirable. Such an order is "interlocutory" in the sense that it merely subjects persons adversely affected to further hearings before a judicial tribunal, and accordingly does not come within the purview of the direct appellate court review provisions of Section 24 (a) applicable only to final orders. Moreover, one who under Section 11 (e) has yet to exhaust his opportunity to be heard in the district court before the plan may be enforced is not a person "aggrieved" by the Commission's order within the meaning of Section 24 (a).

The admission of the court below that it was without jurisdiction to enforce the Commission's order notwithstanding its own review and affirmance of that order, points up other difficulties inherent in its ruling. Its suggestion that its decision is *res judicata* as to the entire Commission order and leaves the district court with no

further function except to enforce, would work a hardship upon security holders whose interests are not represented in the review proceeding. While under Section 24 (a) the petitioning security holder need give notice only to the respondent Commission, under Section 11 (e) all security holders substantially affected by the plan must be given notice of the district court proceeding and be afforded an opportunity for hearing before an enforcement order is entered.

The decision below conflicts with the views of other courts of appeals, and appears inconsistent with the purpose of Congress as evidenced by the legislative history which contains indications that the specialized procedure provided by Section 11 (e) was not intended to be negated by the general review provisions of Section 24 (a).

Even under its own construction of Section 24 (a), the court below was without jurisdiction to review the Commission's order to the extent that the order approved, subject to district court enforcement, provisions of the plan for cancelling United's option warrants and for amending the corporate charter. The common stockholders who filed the petition for review under Section 24 (a) were not "aggrieved" by these provisions which were favorable to them; and the instant petitioner committee, which did object to these provisions, did not intervene until long after the statutory sixty day period for seeking review had expired.

ARGUMENT

The plan and the Commission's order approving it are unusual (though not unique*) in that they cover an entire simplification program, a portion of which, at the request of the affected company, is not to become effective until ordered enforced by a district court. The usual practice is to frame a simplification plan so that review will be had in only one court, or to split the plan into two or more steps, each step being subject to a separate Commission order. Compliance with the requirements of Section 11 (b) of the Act through a series of steps has been judicially approved. *Phillips* v. *S. E. C.*, 156 F. 2d 606, 609 (C. A. 2); *Phillips* v. *S. E. C.*, 185 F. 2d 746, 750 (C. A. D. C.). The instant plan took its present form partly in response to a commitment by United to the Commission in 1949 that a comprehensive plan would be submitted by United thereafter "to complete the transformation of United into an investment company" (R. 7). In addition, the portion of the plan relating to the offer to stockholders of an opportunity to withdraw their pro rata interest in United depended upon market

* See *Community Gas and Power Co. et al.*, 15 S. E. C. 492 (1944), portion of plan approved and enforced *In re American Gas and Power Co.*, 55 F. Supp. 756 (D. Del.). In that case, after Commission approval of a plan, the holding company requested that the Commission apply to a United States district court for enforcement of certain of its provisions.

conditions (R. 42) and might have become impractical if delayed until after there could be district court approval and enforcement.'

The fact that Commission approval of the various proposals designed to achieve compliance with the statutory mandate has been embodied in a single comprehensive order, rather than in separate orders of more limited scope, cannot, in our opinion, affect the basic question as to the review jurisdiction which the court below possessed by virtue of Section 24 (a) of the Act. Nor do we understand that the court below relied upon the particular form of the Commission's order in this case to support its conclusion that it had jurisdiction to review the Commission's action with respect to every phase of the plan, including portions thereof which were not intended to be operative until approved and ordered enforced by a district court pursuant to Section 11 (e) of the Act.

While we agree with petitioner's *present* position that the Court of Appeals was without jurisdiction to review the action of the Commission as respects those provisions of the plan whose effectiveness was conditioned upon district court enforcement, we disagree with petitioner's suggestion that resort to the Section 11 (e) enforcement procedure is authorized only as respects

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[1] No stay pending review was sought as to the withdrawal proposal, which was consummated before the petition for review was filed in the court below.

plan provisions which are "compulsory" rather than "voluntary" in nature (Petitioner's brief, pp. 8–9). The company may request district court enforcement in a wide variety of cases, including cases involving plan provisions which petitioner describes as "voluntary". Normally district court enforcement is sought in situations where the alternative is a conditional plan whose consummation might be prevented, and compliance with Section 11 (b) unduly delayed, by circumstances beyond the control of the Commission or of a court of appeals. See *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. 2d 747, 751 (C. A. 3).

We turn now to a consideration of the respective jurisdictions of the courts of appeals and of the district courts to review initially Commission orders approving simplification plans under Section 11 (e) of the Public Utility Holding Company Act.

I

A COURT OF APPEALS HAS JURISDICTION UNDER SECTION 24 (a) OF THE PUBLIC UTILITY HOLDING COMPANY ACT TO REVIEW DIRECTLY A COMMISSION ORDER APPROVING A SIMPLIFICATION PLAN, OR A PART THEREOF, WHOSE EFFECTIVENESS IS NOT CONDITIONED UPON FURTHER APPROVAL AND ENFORCEMENT BY A DISTRICT COURT

Contrary to the impression which the opinion below may convey, the Commission did not take the position in the court below "that a Commission-approved plan may not under any circum-

stances be reviewed by a court of appeals under Section 24 (a), and that any person aggrieved by such a plan must in the first instance present his objections to a district court in an enforcement proceeding" (R. 408). All that the Commission urged was that the Court of Appeals did not have jurisdiction to review the Commission's action with respect to that portion of the plan, to which the instant petitioner objects, whose effectiveness had been conditioned (pursuant to the company's request) upon district court approval and enforcement pursuant to Section 11 (e). As previously indicated, contrary to the position which petitioner has taken in this Court, petitioner had urged the Court of Appeals to assume jurisdiction and to reverse the Commission's action in approving that portion of the plan.

As respects the Commission's order approving that portion of the plan whose effectiveness was not dependent upon further approval and enforcement by a district court, we agree that the Court of Appeals did have jurisdiction under Section 24 (a) to review and to affirm the Commission's order in this regard. Since these provisions of the plan were operative upon entry of the Commission's order of approval, and district court enforcement was not contemplated or required, the court review and enforcement provisions of Section 11 (e) were wholly inapplicable. Judicial review of the Commission's action could be obtained only in a court of appeals upon a timely petition for

review filed pursuant to Section 24 (a). On this question there is no disagreement among the parties herein, or between the parties and the court below.

II

A DISTRICT COURT, AND NOT A COURT OF APPEALS, HAS JURISDICTION TO REVIEW INITIALLY A COMMISSION ORDER APPROVING A SIMPLIFICATION PLAN, OR A PART THEREOF, WHOSE EFFECTIVENESS IS CONDITIONED UPON FURTHER APPROVAL AND ENFORCEMENT BY A DISTRICT COURT PURSUANT TO SECTION 11 (e) OF THE ACT

The district court review and enforcement provisions of Section 11 (e), on the other hand, serve a distinct statutory purpose with respect to proposals approved by the Commission where the exercise of the broad equity powers of a district court pursuant to Section 11 (e) will avoid conflict with local law or otherwise facilitate consummation. Thus, in the instant case, court enforcement was requested by the company to assure effectiveness of the cancellation of the option warrants and of the proposals requiring changes in the corporate charter.* Contrary to the suggestion of the court below (R. 417), the purpose of the Com-

*In the absence of an enforcement decree Delaware law makes no provision for elimination of a corporate complexity such as United's option warrants, and purports to require a stockholder vote, which might or might not be obtainable as a condition to changes in the corporate charter. By an

mission in conditioning its approval of such proposals upon further approval and enforcement by a district court under Section 11 (e) is not to oust a court of appeals of the jurisdiction it might otherwise possess to afford direct review of Commission action, but rather to utilize the procedure afforded by Congress, when requested by the company concerned, to achieve the goal of the corporate simplification provisions of the Act "as soon as practicable." Section 11 (b).

The court below, while asserting jurisdiction to review the Commission's order notwithstanding its conditional nature, conceded that it lacked power to enforce the plan (R. 417), and recognized that, despite its own affirmance of the Commission's order, the Commission would still need to apply to a district court for necessary enforcement (*ibid.*). It expressed the view, however, that its ruling upon the merits of the plan would be *res judicata* in the district court proceeding and "the district court [would have] no function except to enforce" (*ibid.*). In reaching this conclusion, however, it gave no consideration to differ-

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amendment to the corporation law of the State of Delaware, the Secretary of State has been directed to accept a decree of a federal court enforcing plan provisions which modify a certificate of incorporation. See Delaware General Corporation Law (Title 8, Del. Code of 1953), Sec. 245. Compliance with this provision may not be essential, *Phillips* v. *S. E. C.*, 153 F. 2d 27 (C. A. 2), certiorari denied, 328 U. S. 860, but certainly tends to facilitate consummation of such plan provisions.

ences of procedure, or to the assurance of full hearing to security holders affected by the plan which only the enforcement procedure affords. The district court enforcement proceeding provides for notice, by mail and by publication, to all security holders whose interests would be substantially affected by the plan. Section 24 (a), however, provides for review initiated by a petition filed in a court of appeals by any person aggrieved, which is served only upon the Commission. There is nothing in the procedure under Section 24 (a) which is adapted to affording notices and opportunity for hearing to the many persons who might be affected by an enforcement order and who might become parties to the Section 11 (e) proceeding. Indeed, the instant petitioner Committee for the Warrant Holders was not served with a copy of the petition for review in the court below, and filed a motion to intervene only because it happened to learn of the petition for review, and then only after the sixty day period for seeking review under Section 24 (a) had long expired.

The difficulty of the jurisdictional position taken by the court below would be highlighted in a review proceeding instituted by a security holder of one class, in which representatives of other classes of securities failed to appear, perhaps in reliance upon an expected opportunity to appear in the district court proceeding expressly contemplated by the plan and the Commission's

order. Such persons might represent different interests, and have objections to the plan entirely different from those of the particular security holder whose petition for review has preceded the Section 11 (e) enforcement proceeding. Under the decision of the court below, they would nevertheless have no opportunity to litigate the merits of their contentions in a subsequent enforcement proceeding.

The court below also failed to provide any satisfactory explanation as to how, under its own construction of Section 24 (a), it obtained jurisdiction in this case with respect to the conditional provisions of the plan. Section 24 (a) authorizes the filing of a petition for review by a person "aggrieved by an order issued by the Commission", and, as previously noted, requires such a petition to be filed "within sixty days after the entry of such order". No such petition was filed in the instant case as respects the provisions of the plan relating to the cancellation of the option warrants and the amendment of the corporate charter. The common stockholders who filed the petition for review were not "aggrieved" by these provisions of the plan, which were favorable to them. The instant petitioner, representing warrant holders who did claim to be aggrieved by these provisions of the plan, did not seek to intervene until long after the statutory period for review had expired. The Court of Appeals clearly had no jurisdiction on the sixty-first day after

the entry of the Commission's order; and we fail to see how it could obtain jurisdiction thereafter, *nunc pro tunc*, by permitting the warrant holders to intervene even if the statute could properly be construed to afford them the right of review upon the filing of a timely petition. *Cf. Columbia Oil & Gas Corp.* v. *S. E. C.*, 134 F. 2d 265, 266–7 (C. A. 3).

Apart from the facts of the instant case, the court below recognized that Section 24 (a) does not authorize court review of every "order" entered by the Commission under the statute, including an order which may be conditional and not final in nature (R. 412). See *Okin* v. *S. E. C.*, 145 F. 2d 206, 207 (C. A. 2), remanded on other grounds, 325 U. S. 840; *Phillips* v. *S. E. C.*, 171 F. 2d 180, 182–3 (C. A. 2). It expressed the view, however, that "the Commission cannot make its approval of a plan contingent upon a district court's later approval, and cannot condition the effectiveness of the plan upon enforcement by a district court" (R. 412). It offered no basis for that conclusion, however, except the fear that if the Commission were permitted to do so it could shut "the door against review by a court of appeals under § 24 (a)" (R. 418). However, if district court enforcement is regarded as necessary or advisable to achieve the statutory goal, there can be no impropriety in Commission action, taken at the request of the affected company, which conditions the effectiveness of a proposal upon such court

enforcement merely because, in so doing, that action may cut off direct appellate court review under Section 24 (a). See *Lownsbury* v. *S. E. C.*, 151 F. 2d 217, 221 (C. A. 3), certiorari denied, 326 U. S. 782. The procedure contemplated by Section 11 (e), it should be noted, does not cut off eventual review by a court of appeals, and provides a more expeditious method of obtaining necessary court enforcement, since initial court review and enforcement is obtainable in one proceeding, rather than in two proceedings as contemplated by the decision below. Substantial delay in obtaining enforcement of a plan would create difficult problems in the administration of the statute in those cases where time of consummation is of the essence.

Nor do we regard the availability of direct district court enforcement as being dependent upon the outcome of a race for the courts, as the court below decided in attempting to reconcile its own holding with the conflicting holdings of other courts (R. 416). See *Okin* v. *S. E. C.*, 145 F. 2d 206 (C. A. 2), remanded on other grounds, 325 U. S. 840; *Lownsbury* v. *S. E. C.*, 151 F. 2d 217 (C. A. 3), cert. denied, 326 U. S. 782; *supra; Blatchley* v. *S. E. C.*, 157 F. 2d 898 (C. A. 1); *Goldfine* v. *S. E. C.*, 157 F. 2d 899 (C. A. 1); *Leventritt* v. *S. E. C.*, 178 F. 2d 336 (C. A 2), dismissing petitions under Section 24 (a) to review Commission orders conditioning effectiveness of plans upon district court enforcement. The court below distinguished all of these cases,

except the *Lowndsbury* case, on the ground that in each instance the petition for review under Section 24 (a) had been filed after the Commission had made application to a district court pursuant to Section 11 (e). "The court which first obtains jurisdiction," the court below observed, "will retain it to the exclusion of other courts" (R. 416). Had the Commission not deferred its Section 11 (e) application pending review under Section 24 (a) of the provisions of the plan for which no court enforcement was contemplated (as it decided to do in the interests of orderly consummation of the entire plan), but had it rushed instead to a district court before review was sought under Section 24 (a), the court below indicated that it would not have questioned such "shutting the door against review by a court of appeals".

We disagree with the court below that Congress intended that the availability of the Section 11 (e) court procedure for objections to a plan would be dependent upon so artificial a consideration, or that the cases denying review under Section 24 (a) were decided upon that ground. Rather, one or more of the following grounds for denying review under Section 24 (a) appear to have been relied upon by the courts. First, the general review provisions of Section 24 (a) should not be construed to negate the specialized scheme of judicial review under Section 11 (e), expressly provided when the company requests it and this

Commission accedes to the request. Second, the Commission's conditional order is an "interlocutory" one[9] in the sense that it merely subjects persons adversely affected to further hearings before a judicial tribunal. Third, a person who under Section 11 (e) has yet to exhaust his "opportunity to be heard" in the district court before the plan may be enforced is not "a person or party aggrieved by an order issued by the Commission" within the meaning of Section 24 (a).

In *Lownsbury* v. *S. E. C.*, 151 F. 2d 217 (C. A. 3), a petition for review was dismissed even though no district court enforcement proceeding had yet been instituted. The court below endeavored to distinguish that case from the case at bar by pointing out that effectiveness of the plan there was conditioned not only upon district court enforcement but also upon approval by a vote of the corporation's shareholders prior to its submission to a district court (R. 411–412). The additional condition as to stockholder approval,

[9] Such an order, while "final" in the sense that it is the last step in the proceedings before the Commission, is actually an interlocutory step in the statutory process in which both the administrative agency and the enforcement court must act before the order has any effect upon the rights of security holders. For purposes of direct review in a court of appeals, Section 24 (a) should be regarded as inapplicable to such an order for the same reasons which led to the decision that general provisions for review of agency orders do not apply to interlocutory determinations. See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.—

the court below observed, was one "which the Commission had a right to impose" and one which made its approval order truly "interlocutory" (R. 412). The decision of the court in the *Lowensbury* case, of course, was not predicated on the factual difference emphasized by the court below; and, as previously indicated, the assumption that the Commission may not properly condition effectiveness of an order of approval upon district court enforcement is one which finds no justification in the statute.

The court below did recognize that the court opinions in the cases which it felt compelled to distinguish contained statements which tend to support the Commission's theory that § 11 (e) sets up, with respect to approved plans of compliance, 'a specialized scheme of judicial review' by a district court which precludes review of such plans by a court of appeals under § 24 (a)" (R. 412–413). It characterized those statements, however, as mere *obiter dicta* "rendered nugatory" by this Court's decision in *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (R. 413). In that case, however, this Court merely held that the scope of review under Section 11 (e) is the same as that under Section 24 (a). The question as to the circumstances under which exclusive jurisdiction is obtained under either section of the Act was not involved. The interpretation of this Court's opinion in the *Central-Illinois* case adopted below, moreover, has been

expressly rejected by the Court of Appeals for the Second Circuit in *Leventritt* v. *S. E. C.*, 178 F. 2d 336, 337.

It may be observed, also, that the legislative history of Section 11 appears to be in harmony with the foregoing construction of the statute, as Judge Clark observed in *Okin* v. *S. E. C.*, 145 F. 2d 206, at 208 (C. A. 2). That history, he concluded, evinced—

> * * * a congressional intent that the relationship of the Securities and Exchange Commission and district court provided for in § 11 should be "exactly" the same as that of the Interstate Commerce Commission and the district court in railroad reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. A. § 205 [footnoting a reference to the Senate debates omitted here]. A review provision in § 77, which provides for equitable relief from any "order of the Interstate Commerce Commission" in accordance with the usual review of orders of that commission before a statutory three-judge court, 28 U. S. C. A. § 47, has been held inapplicable to a Commission order approving a plan of reorganization, which was, of course, subject to further approval by the district court. *Chicago & N. W. R. Co.* v. *United States*, D. C. N. D. Ill., 52 F. Supp. 65, affirmed 320 U. S. 718, 64 S. Ct. 369. Even without the statement in the legislative debates, the two situations would have appeared so closely comparable as to make this precedent persuasive.

For the reasons stated, we believe that the court below erred in deciding that it had jurisdiction, *inter alia*, to review that phase of the Commission's order which, in approving the provisions of the plan relating to the cancellation of the option warrants and amendments to the corporate charter, conditioned the effectiveness of these provisions upon further approval and enforcement by a district court.

CONCLUSION

If this Court should agree that the court below was without jurisdiction to review that part of the Commission's order whose effectiveness was conditioned upon district court approval and enforcement, it should modify the judgment and decree below, but only to the extent of setting aside that portion thereof which granted petitioner's motion to intervene and affirmed that part of the Commission's order whose effectiveness was so conditioned.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

WILLIAM H. TIMBERS,
General Counsel,

MYRON S. ISAACS,
Associate General Counsel,

ALEXANDER COHEN,
Special Counsel,
Securities and Exchange Commission.

NOVEMBER, 1953.

APPENDIX

Section 5 (d) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79e (d), provides:

> Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it shall so declare by order and upon the taking effect of such order the registration of such company shall, upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors, cease to be in effect. The denial of any such application by the Commission shall be by order.

Section 11 (b) (2) of said Act, 15 U. S. C. 79k (b) (2), provides:

> It shall be the duty of the Commision, as soon as practicable after January 1, 1938:
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> * * * * *
>
> (2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the

provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

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